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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PLAINS COTTON COOPERATIVE ASSOCIATION OF LUBBOCK, TEXAS,

Petitioner,

v.

GOODPASTURE COMPUTER SERVICE, INC., *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 20, 1987

QUESTIONS PRESENTED

1. Whether copyright in a computer program protects elements of structure, sequence and organization of the program, as with copyright of any other literary work, or only the literal elements of the program, as to which the courts of appeals are in conflict?

2. Whether an applicant for temporary injunction expressly authorized to prevent or restrain infringement of a copyright under Section 502 of the Copyright Act, 17 U.S.C. § 502(a), must nonetheless make an independent showing of irreparable injury, as to which the courts of appeals are in conflict?

[Although Petitioner does not view Question 3 as meriting certiorari independently, Petitioner reserves the right to argue Question 3 in the event certiorari is granted on either of the preceding Questions.]

3. Whether the Court of Appeals may affirm the denial of a temporary injunction on trade secrets grounds based on reasons unstated in the District Court's order, in violation of Rule 52(a) of the Federal Rules of Civil Procedure.

LIST OF PARTIES

The parties to this action below were petitioner Plains Cotton Cooperative Association of Lubbock, Texas and respondents Goodpasture Computer Service, Inc., William James Godlove, Richard R. Fisher, Peter H. Cushman, and Clarence Michael Smith. Petitioner Plains Cotton Cooperative Association of Lubbock, Texas has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521 (9th Cir. 1984) 21 n.14, 24

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dism'd by agmt.*, 464 U.S. 1033 (1984) ..... 6, 21 & n.14, 25

Arenstein v. Porter, 154 F.2d 464 (2d Cir. 1946) 20 n.13

Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) 24

Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127 (N.D. Cal. 1986) 14-15

Digital Communications Associates, Inc. v. Softklone Distributing Corp., No. 86-128-A (N.D. Ga. March 31, 1987) 15

Donald v. Zack Meyer's T.V. Sales & Service, 426 F.2d 1027 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) 18

Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202 (N.D. Tex. 1981) 20

E.F. Johnson Co. v. Uniden Corp., 623 F. Supp. 1485 (D. Minn. 1985) 14 n.9

Educational Testing Services v. Katzman, 793 F.2d 533 (3d Cir. 1986) 24

Harper & Row, Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218 (1985) 20

Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189 (2d Cir. 1985) 24

Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) 20 n.12

L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976) 18

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L.C. Page & Co. v. Fox Film Corp., 83 F.2d 196 (2d Cir. 1936) 27

Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) 18

Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931) 18, 19

Q-Co Industries, Inc. v. Hoffman, 625 F. Supp. 608 (S.D.N.Y. 1985) 14 n.9

Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955) 27

SAS Institute, Inc. v. S & H Computer Systems, Inc., 605 F. Supp. 816 (M.D. Tenn. 1985) 14 n.9, 23

In re Sherwood, 613 F.2d 809 (C.C.P.A. 1980), *cert. denied*, 450 U.S. 994 (1981) 17

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) 19, 20 n.13

Synercom Technology, Inc. v. University Computing Co., 462 F. Supp. 1003 (N.D. Tex. 1978) 7-9

Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983) 19

Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 877 (1987) 7-9, 14, 16 n.11

Williams v. Arndt, 626 F. Supp. 571 (D. Mass. 1985) 14 n.9

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Other Authorities

D. Bender, COMPUTER LAW § 2.06[3] (1985) 16 n.11

Bender, *Protection of Computer Programs: The Copyright/Trade Secret Interface*, 47 U. PITT. L. REV. 907 (1986) 12, 24

Comment, *Fifth Circuit Refuses to Embrace* Whelan, COMPUTER L. & TAX REP., April 1987, at 9 ..... 12 n.8

Congress of the United States, Office of Technology Assessment, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION (1986) 11-13, 15-16, 24

Frank, CRITICAL ISSUES IN SOFTWARE (1983) 17

H.R. REP. NO. 1476, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659.....21, 26

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INFOWORLD, March 16, 1987, at 1, col. 1..... 11 n.7

27 JURIMETRICS 129-30 (1986) 13 n.8

National Commission on New Technological Uses of Copyrighted Works, FINAL REPORT (1978) 21-23

M. Nimmer, NIMMER ON COPYRIGHT (1986)

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Note, *Copyright Protection of Computer Program Object Code*, 96 HARV. L. REV. 1723 (1983) 16 n.11

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Note, *Defining the Scope of Copyright Protection for Computer Software*, 38 STAN. L. REV. 497 (1986) 13 n.8, 16 n.11

Reback & Hayes, *The* Plains *Truth: Program Structure, Input Formats and Other Functional Works*, COMPUTER LAW., March 1987, at 1. ..... 12 n.8

Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine Readable Form*, 1984 DUKE L. J. 663 ..... 11 n.6

Sterne & Kessler, *An Overview of Software Copying Policies in Corporate America*, 1 J. L. & TECH. 157 (1986) 11

Symposium, *The Future of Software Protection*, 47 U. PITT. L. REV. 903 (1986) 12 n.8

Wernick, *Fifth Circuit Declines to Follow* Whelan, COMPUTER L. STRATEGIST, April 1987, at 1 ..... 12 n.8

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GOODPASTURE COMPUTER SERVICE, INC., *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Plains Cotton Cooperative Association of Lubbock, Texas ("Plains") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 21, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 807 F.2d 1256, and is reprinted in the appendix of this petition, p. 1a, *infra*. The memorandum order of the United States District Court for the Northern District of Texas (Woodward, C.J.) has not been reported. It is reprinted in the appendix to this petition, p. 18a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331(a) and 1338(a), the petitioner, Plains, brought this action in the

Northern District of Texas. On February 17, 1986, the district court denied Plains' motion for temporary injunction. *See infra* p. 18a.

On January 21, 1987, the Court of Appeals affirmed the denial of preliminary injunction. *See infra* p. 1a. Petitioner Plains timely petitioned for rehearing and rehearing *en banc*. Those petitions were denied on February 19, 1987. *See infra* 16a.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

17 U.S.C. § 102(a). Subject matter of copyright: In general

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works; . . . .

17 U.S.C. § 106. Exclusive rights in copyrighted works.

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive right to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work; . . . .

17 U.S.C. § 502(a). Remedies for infringement: Injunctions

Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

STATEMENT OF THE CASE

This case presents important issues relating to the scope of protection afforded to computer software by copyright and the availability of pretrial relief to copyright owners. The Fifth Circuit quite deliberately set itself against every other circuit and virtually every other court to consider these two issues. Because of the fundamental nature of the questions raised and the representative nature of this factual scenario in the computer industry, this case presents significant issues for all computer software owners and for copyright owners generally.

Plains commenced this action on January 15, 1986, against Godlove, Fisher, Cushman, and Smith (collectively the "Programmer Defendants") and Goodpasture Computer Service, Inc. ("Goodpasture"), seeking damages and injunctive relief for misappropriation of trade secrets, unfair competition, conversion, breach of confidential relationship, and trade dress infringement. (R. 1) Plains invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331(a) and 1338(a), in that the complaint alleged civil RICO violations, 18 U.S.C. § 1961, and violations of section 43(a) the Lanham Act, 15 U.S.C. § 1125(a).

In a factual pattern common in the computer industry, the Programmer Defendants were former employees of Plains; Plains' claims arose from the Programmer Defendants' preparation for Goodpasture of a computer system virtually identical to Plains' Telcot computer system. In January, 1986, Plains registered its copyright in its Telcot computer program and

associated manuals. By right, Plains amended its complaint to include claims for copyright infringement. (R. 91) 17 U.S.C. § 501.

Plains is a nonprofit cooperative of some twenty thousand cotton growers in Texas and Oklahoma. (Tr. 20, 22) Plains' Telcot computer system was developed to assist cotton growers in marketing their cotton. Each bale of cotton is tracked from delivery to the gin, through grading and weighing, to sale to a cotton broker. Each buyer and seller can monitor sales of other cotton and determine a true market price.

Plains began development of Telcot in the early 1970s. (Tr. 23) The Programmer Defendants were some of the principal programmers of Telcot (Tr. 247-48, 293), however many other Plains programmers assisted in the development of Telcot. (Tr. 293-94) Telcot has continued to evolve, including the addition of a gin bookkeeping system in 1980, and this refinement and enhancement continues still. At the time this action was commenced, Telcot consisted of some 1,000,000 lines of code.

On or about April 13, 1984, the Programmer Defendants left Plains and went to work for Commodity Exchange Service Co. ("CXS") (Tr. 227) Their goal was to revise the Telcot system to run using personal computers rather than the large central computer used by Plains, in furtherance of an agreement between Plains and CXS. (R. 307, 321) In developing this system, the Programmer Defendants had access to the Telcot code, with Plains' knowledge and permission. (Tr. 232) After approximately one year's work, the Programmer Defendants had prepared a comprehensive design document for a system that would resemble Telcot as much as possible, given the differences involved in using personal computers with local storage and processing power, instead of the unintelligent terminals used in the Telcot system. (Tr. 222-24)

In March, 1985, Goodpasture began exploring various business relationships with CXS and the Programmer Defendants. Because the CXS-Plains agreement restricted CXS' ability to enter into a relationship with Goodpasture, Goodpasture adopted the simple expedient of hiring the Programmer Defendants and architects of Telcot. Within twenty days of their employment with Goodpasture, the Programmer Defendants had "created" a personal computer-based design for an electronic cotton marketing system. (Tr. 141-42) Unsurprisingly, much of that design was a verbatim copy of the CXS design manual. The completed Goodpasture program, GEMS, was highly similar to Telcot.[1] Goodpasture's defense to Plains' copyright claims was that certain similarities were dictated by the nature of the cotton business and that some similarities could be ascribed to the Programmer Defendants' familiarity with Telcot. Thus, Godlove, who had supposedly not used an actual copy of Telcot in preparing the Telcot "clone," testified that he would design a program the thirteenth time (for Goodpasture) the same way he had the twelve times before (for Plains). (Tr. 481)

A full, two-day evidentiary hearing was held on Plains' motion for a preliminary injunction on its copyright and trade secret claims on February 7 and 10, 1986. On February 17, 1986, the district court entered a terse and cryptic order denying Plains' motion, apparently on the bases that Plains

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[1] Although review of the extensive expert testimony indicating copying is unnecessary at this point, Plains' expert, a professor of computer science at Texas A&M University, testified that GEMS and Telcot were structurally similar, that the GEMS design documents were verbatim copies of the CXS design documents, that the data structures, system structures, and individual algorithms in GEMS were substantially similar to those used in Telcot, and that in at least one instance, there was verbatim copying of program code. (Tr. 148-61)

had not established verbatim copying of its software and had not independently established irreparable injury. Appendix at 18a. The trial court's order did not address Plains' trade secret claims. (R. 340)

Plains appealed to the Court of Appeals under 28 U.S.C. § 1292(a)(1). The appeal was argued on September 4, 1986. On January 21, 1987, a panel of the Fifth Circuit affirmed. 807 F.2d 1256; Appendix at 1a. Although the Court of Appeals discussed the factual predicate of the appeal,[2] its copyright holding ultimately rested on two crucial erroneous legal conclusions.

The Fifth Circuit acknowledged that the district court's denial of injunctive relief rested on its conclusion that Plains "had failed to satisfy two of the four prerequisites for injunctive relief: a showing of irreparable harm and a showing of a substantial likelihood of success on the merits." 807 F.2d at 1259; Appendix at 6a. Plains had argued that it was entitled to a presumption of irreparable harm upon a showing of likelihood of success on the merits, citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dism'd by agmt.*, 464 U.S. 1033 (1984). The Fifth Circuit rejected *Apple v. Franklin* and decisions of three other circuits, stating "That rule, however, is not established in this circuit," and holding that a copyright owner applying for preliminary injunction must make an independent showing of irreparable harm. 807 F.2d at 1261; Appendix at 9a.

Next, in responding to Plains' substantive copyright arguments, the Court of Appeals made "a judgment about the extent of the protection offered by appellant's copyright," on which the Court of Appeals held "[t]he legal finding by the

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[2] Plains believes that the Fifth Circuit misinterpreted the record in ways that affected its decision, but that do not affect consideration of the legal issues raised in this petition for certiorari.

district court ultimately rests." 807 F.2d at 1262; Appendix at 11a. Perceiving a conflict between the district court opinion in *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1978) and the Third Circuit's opinion in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 877 (1987), the Fifth Circuit followed what it believed to be the holding of *Synercom*, rather than following the Third Circuit in *Whelan*.[3] The Fifth Circuit held that copyright of computer programs protects against only copying of "line-by-line program design," and does not protect the "functional design" of the program. 807 F.2d at 1262; Appendix at 11a.

The Fifth Circuit acknowledged that "GEMS is very similar to Telcot on the functional specification, programming, and documentation levels." *Id.* at 1259; Appendix at 4a. Plains argued that computer programs, as literary works, embody various levels of organization ranging from (1) the purpose of the program, to (2) the structure of the program ("functional design," in the Fifth Circuit's vocabulary), to (3) the actual verbatim statements in computer programming language. Plains contended that program structure or design was sufficiently expressive to be afforded copyright protection. The Fifth Circuit relied upon the opinion in *Synercom*, in which the district court held "that 'input formats' of a computer program — the organization and configuration of the information fed to the computer — were ideas, not expressions, and thus were not protected by copyright." *Id.* at 1262; Appendix at 11a. The Fifth Circuit held that *Synercom's* "input formats represent a level of computer software design more specific than functional design and more general than line-by-line program design." *Id.* Thus, the Fifth Circuit saw a spectrum ranging

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[3] Judge Higginbotham, now on the Fifth Circuit, authored the *Synercom* decision when he was on the district bench.

from concrete "line-by-line program design," to less concrete "input formats," and to still less concrete "program design." Anything on this spectrum more abstract than "line-by-line program design" was idea, not expression, and thus was not protected by copyright, under the Fifth Circuit's reasoning.

The Third Circuit's opinion in *Whelan* was issued after briefing of this case in the Fifth Circuit but before oral argument. At oral argument, Plains commended that opinion to the Fifth Circuit. The Fifth Circuit, however, expressly rejected *Whelan*, viewing it as

> admittedly "at odds with Judge Higginbotham's scholarly opinion [in *Synercom*]." [797 F.2d] at 1239. *Whelan* rejects the premise developed in *Synercom* that "there [is] a difference between the copyrightability of sequence and form in the computer context and in any other context," *id.* at 1240, holding that the structure, sequence, and organization of computer programs are copyrightable.

Id. Accordingly, the Fifth Circuit "decline[d] to embrace *Whelan* . . . ."[4] Thus, by rejecting *Whelan* in favor of *Synercom*,

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[4] The Fifth Circuit followed this comment with two "reasons" for rejecting *Whelan* that seem irrelevant. First, the opinion observes that the appeal was from a preliminary injunction. Second, the opinion notes the defendants' claim that the many similarities between GEMS and Telcot were dictated by external factors — a version of the *scenes a faire* defense. These points, even if correct, have nothing to do with whether the Fifth Circuit embraces or spurns *Whelan*. The Fifth Circuit prefaced its rejection of *Whelan* with its observation that "[t]he legal finding by the district court ultimately rests on a judgment about the extent of the protection offered by appellant's copyright. On that issue, we look to our colleague Judge Higginbotham's opinion in *Synercom*." 807 F.2d at 1262; Appendix at 11a. Thus, the Fifth Circuit's basis for rejecting *Whelan* was its understanding of *Synercom*, not the irrelevant factual factors cited.

the Fifth Circuit endorsed its understanding of *Synercom* — copyrightability is different in the computer context — and rejected *Whelan's* holding that the structure, sequence, and organization of computer programs are copyrightable.

Finally, relying upon factual "findings" wholly absent from the district court's order, as well as legal conclusions previously unknown in Texas law, the Court of Appeals affirmed the denial of preliminary injunction on Plains' trade secret claim. The Court of Appeals held that trade secret protection was merely coextensive with its limited view of copyright protection and that "the trade secret battle was nothing more than a restaging of the copyright battle." *Id.* at 1263; Appendix at 13a. Thus, despite the complete absence of specific factual findings and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, the Court of Appeals affirmed the district court's "ruling" on trade secrets.[5]

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[5] Although the Fifth Circuit's incorrect substantive trade secret holdings are equally as harmful to the industry as that court's copyright holdings, those state law issues are not properly before this Court. The Fifth Circuit's actions in disposing of the trade secret issue absent any trial court findings as required by Rule 52(a), however, can properly be considered by this Court and that is the basis of Question 3 presented in this petition. Because this Question is not urged as an independent ground for certiorari, this point will not be discussed further in this petition.

Plains also claimed that GEMS was an infringing "deriviative work" of Telcot, based on the clear line of descent from Telcot to CXS to GEMS. 17 U.S.C. § 106(2). Because neither the district court nor the Fifth Circuit opinions addressed this argument, Plains does not claim this point as a basis for certiorari. Plains believes, however, that the point is preserved by Question 1 and intends to argue it if certiorari is granted.

REASONS FOR GRANTING THE WRIT

Plains appealed from the denial of a preliminary injunction for infringement of Plains' copyright in computer software and for misappropriation of Plains' trade secrets. The Court of Appeals affirmed the denial of injunctive relief based on holdings regarding (*i*) the showing required for preliminary injunction against copyright infringement and (*ii*) the scope of protection copyright affords computer software, and thereby placed the Fifth Circuit in conflict with every other circuit that has considered those two copyright questions. Had the Court of Appeals simply upheld the district court's denial of a preliminary injunction because it was not an abuse of discretion and because the evidence supported the trial court's ruling, this case would not merit consideration by this Court. As the Court of Appeals noted, however, the denial of the preliminary injunction did not rest simply upon a review of the facts, but on a question of law: "The legal finding by the district court ultimately rests on a judgment about the extent of the protection offered by appellant's copyright." 807 F.2d at 1262; Appendix at 11a. The Fifth Circuit's exceedingly restrictive holdings on the copyright issues, both substantive and procedural, merit certiorari.

I. THE DECISION BELOW THAT COPYRIGHT DOES NOT PROTECT PROGRAM STRUCTURE CONFLICTS WITH BOTH THE POLICY OF COPYRIGHT LAW AND THE OTHER DECISIONS CONSIDERING THE ISSUE

It is well-accepted in copyright that the author's expression of ideas through structure and organization — levels more abstract than the verbiage itself — is protected by copyright. It is also well-accepted that infringement does not require verbatim copying. The Fifth Circuit erred in applying different standards to computer software, in conflict with the Third

Circuit. Copyright of computer software should protect the creative choice expressed in the sequence, structure and organization of a computer program. The Fifth Circuit's holding to the contrary will endanger an important industry and will create confusion in the courts.

A. The Conflict Created by the Decision Below Merits Prompt Resolution By This Court

1. *The Decision Below Will Adversely Impact an Important Industry.* — The computer software industry is now a highly significant portion of the national economy.[6] No industry can remain viable if it cannot preserve its property rights in its stock in trade. In the computer industry, the stock in trade is proprietary rights in computer software. Losses due to outright copying of computer software are estimated as high as $800 million for 1985. Congress of the United States, Office of Technology Assessment, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 203 (1986) [hereinafter cited as OTA REPORT]. Those losses were from plainly illegal verbatim copying. If competitors are permitted — legally — to steal the structure of a program, the losses may be much higher.[7] This could be devastating to an industry already operating on thin margins. *See* Sterne & Kessler, *An Overview of Software Copying Policies in Corporate America*, 1 J. L. & TECH. 157, 158 n.2 (1986).

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[6] Estimated revenue from software sales in 1982 is as high as $45 billion. Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine Readable Form*, 1984 DUKE L. J. 663, 691.

[7] The potential for such losses is evident from the highly publicized Lotus "clone" litigation. *See, e.g.*, INFOWORLD, April 13, 1987, at 6, col. 1; INFOWORLD, March 16, 1987, at 1, col. 1.

Prior to the Court of Appeals' opinion, copyright was one of the most favored methods of protecting such proprietary rights. In reporting to Congress on the impact of new technology on intellectual property rights, the Office of Technology Assessment explained its emphasis on copyright as a means of protecting those rights as follows:

> There are two major reasons for this emphasis. First, since copyright is concerned primarily with the use and flow of information and information-based products and services, it is the area of intellectual property law that will be most affected by advances in communication and information technologies. Second, it is to copyright that the creators, developers, producers, and distributors of new information technologies are looking in their efforts to gain legislative protection for their works.

OTA REPORT at 25. *See also* Bender, *Protection of Computer Programs: The Copyright/Trade Secret Interface*, 47 U. PITT. L. REV. 907, 910, 911 (1986) ("Indeed, during the 1980s, industry interest in copyright has skyrocketed, perhaps eclipsing that in trade secret, which was the traditional bastion of software protection."). After the decision below, however, copyright may have lost its utility for protecting intellectual property rights in computer software.[8]

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[8] Another measure of the importance of the issues at stake in this decision is the number of legal articles dealing with protection of software through copyright. Indeed, the decision below has already spawned articles noting the conflict now existing in the circuits. *See* Comment, *Fifth Circuit Refuses to Embrace* Whelan, COMPUTER L. & TAX REP., April 1987, at 9; Wernick, *Fifth Circuit Declines to Follow* Whelan, COMPUTER L. STRATEGIST, April 1987, at 1; Reback & Hayes, *The* Plains *Truth: Program Structure, Input Formats and Other Functional Works,* COMPUTER LAW., March 1987, at 1. The volume of scholarly writing dealing with the general area of protection of computer software is legion. *See, e.g.*, Symposium, *The*

The Court of Appeals' opinion reflects a radically limited view of copyright protection (both substantive and procedural) that essentially vitiates that intellectual property right for computer software — the Fifth Circuit held that copyright protection of computer software protects against only the extraordinarily rare event of verbatim copying of computer programs. The OTA Report discusses the impact on the computer software industry of such a result:

> The practical import of appropriate protection for computer programs lies in the public policy objectives of the copyright system itself. For computer program proprietors and creators, as well as to the domestic and international economies, it is important that computer programs be adequately protected. If courts construe copyright protection in computer programs narrowly, creators and proprietors may well find unprotected the very thing that distinguishes their product from others — its logic and design. Equally important, if only the precise code is considered expression, copyright protection will be of limited use, since this expression can be easily changed by competitors.

OTA REPORT at 83 (footnote omitted). This Court should not permit such adverse consequences to transpire without at least passing on the matter.

2. *The Decision Below Conflicts With the Decisions of Other Courts that Have Addressed the Issue and Thus Will Engender Confusion.* — To date, every court to consider the extent to

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Future of Software Protection, 47 U. PITT. L. REV. 903 (1986); 27 JURIMETRICS 129-30 (1986) (cumulative index listing over 30 articles in *Jurimetrics* on software protection); Note, *Defining the Scope of Copyright Protection for Computer Software*, 38 STAN. L. REV. 497, 529 (1986) ("Courts ought to make clear that structure is a copyrightable element of a program.").

which copyright protects computer programs, other than the Court of Appeals below, has held that nonliteral elements of computer programs embody creative choices that should be protected. The most thorough analysis of the issues involved is stated in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 877 (1987). That court squarely held that "copyright protection of computer programs may extend beyond the programs' literal code to their structure, sequence and organization." *Id.* at 1248. *See generally id.* at 1233-42. The Fifth Circuit acknowledged its conflict with *Whelan*. 807 F.2d at 1262; Appendix at 11a ("We decline to embrace *Whelan* . . . .").[9]

Even before the radical split created by the decision below, the district courts were beginning to follow diverging paths. Thus, the district court in *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127 (N.D. Cal. 1986), determined to follow *Whelan* and reject *Synercom* in deciding that "copyright protection is not limited to the literal aspects of a computer program, but rather that it extends to the overall structure of a

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[9] The decision below also conflicts with the opinions of the district courts to consider the issue. *See Williams v. Arndt*, 626 F. Supp. 571, 577-78 (D. Mass. 1985) (computer program implementation of stock trading plan infringes copyright in book describing stock trading plan); *Q-Co Industries, Inc. v. Hoffman*, 625 F. Supp. 608, 615-16 (S.D.N.Y. 1985) (endorsing general proposition that infringement is found "if similarity is shown within [the alleged infringing program] for a substantial element of the [original] program," but finding that the similarities shown "can be more closely analogized to the concept of wheels for a car rather than the intricacies of a particular suspension system."); *E.F. Johnson Co. v. Uniden Corp.*, 623 F. Supp. 1485 (D. Minn. 1985) (translation of computer program from one programming language on one computer to different programming language on another computer is infringement); *SAS Institute, Inc. v. S & H Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985) (same).

program, including its audiovisual displays." *Id.* at 1133.[10] Recently the district court in *Digital Communications Associates, Inc. v. Softklone Distributing Corp.*, No. 86-128-A (N.D. Ga. March 31, 1987) rejected *Broderbund* as taking "an over-expansive and erroneous reading of *Whelan*." Slip op. at 11. The court followed what it believed to be a "correct" reading of *Whelan* and distinguished *Synercom* on its facts. *Id.* at 21-24. The endorsement of *Synercom* and rejection of *Whelan* by the Fifth Circuit is bound to accelerate this divergence and lead to further disagreement among both the district courts and circuit courts in the nation.

The Office of Technology Assessment noted that "the Federal courts, in interpreting copyright law, will eventually face a dilemma" entailed by the choice between providing copyright protection for program structure or only for literal code. OTA REPORT at 81. After *Whelan* and *Plains*, that dilemma is here, and the computer software industry is impaled on its horns. The Office of Technology Assessment later described the only way out of that dilemma:

> Because accessibility to particular courts is random, determined by jurisdictional rules and idiosyncratic characteristics of an individual litigant's residence or business operation, and because courts are generally not specialized according to subject matter, different courts in different regions of the country may deal with the same legal question at the same time without a method of coordination and consolidation. *Until the Supreme Court chooses to decide between contradictory or conflicting lower court outcomes in such cases, inconsistent practices may be pursued in different area or by different computer industries during*

[10] *Broderbund* dealt with a copyright of the audiovisual display, rather than copyright in the program itself.

> *the not inconsiderable period of time which may elapse before a "unifying" Supreme Court decision is reached.*

Id. at 278 (emphasis added). Plains respectfully suggests that it is time for this Court to make a "unifying" decision and put an end to the inconsistent practices that may be pursued across the country in light of the Fifth Circuit's decision.

B. The Decision Below Was In Error Because Copyright Should Protect the Creative Choices Made in Program Structure and Organization

1. *The Process of Programming Entails the Exercise of Creative Choice.* — At the simplest level, a computer program is a series of instructions that tells a computer how to manipulate and process data. That description is as informative as describing a novel as a series of words that tells a story. Sophisticated computer software, such as Plains' Telcot program, has levels of structure and organization, just as a novel has themes, plot, and character development. Like the author of a novel, the designer of a system such as Telcot begins the program creation at the highest, thematic level, rather then beginning with the "words" that make up the story.[11]

The program designer's first task is to determine what the program is to do — the functional specification. Once the functions are determined, the designer then breaks the overall goals of the program down into constituent parts — the design specification. While the functional specification tells *what* the software does, the design specification tells *how* the software

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[11] There are many discussions of the process of computer programming in the literature. *See, e.g., Whelan,* 797 F.2d at 1229-31; D. Bender, COMPUTER LAW § 2.06[3] (1985); Note, *Defining the Scope of Copyright Protection for Computer Software,* 38 STAN. L. REV. 497, 500-01 (1986); Note, *Copyright Protection of Computer Program Object Code,* 96 HARV. L. REV. 1723, 1724-25 (1983).

does it. The various functions specified at the functional level are allocated in the design specification level among different segments of the program: "modules" or "routines" or "subroutines." The design specification may also include a description of the step-by-step methods — algorithms — used within each module or subroutine to perform its specified function.

Once the functional and design specifications are in place, the actual computer programming can begin. Computer programs are written in computer "languages," which are highly structured, highly stylized grammars in which a trained computer programmer can converse. In contrast to the choices made in program design, the actual coding of that design in a computer language "may require only the droning use of clerical skill." *In re Sherwood*, 613 F.2d 809, 812 (C.C.P.A. 1980), *cert. denied*, 450 U.S. 994 (1981) (patent case). After the program is coded, it must be "debugged" and all errors found and corrected. One estimate is that only 20% of the cost of program development goes into actual coding of the program. Frank, CRITICAL ISSUES IN SOFTWARE 22 (1983) (cited in *Whelan*, 797 F.2d at 1231). Then adequate documentation must be prepared, both to enable users to operate the program and to enable future programmers to modify the program. Although a computer *program* may be thought of as just the statements in the programming language, the computer *software* is actually the entire panoply of material: functional specification, design specification, programs, and documentation.

At each of these levels, the computer programmer faces the same creative choices as a novelist: What functions should be included in the system? How should the various functions be divided into modules, routines, and subroutines? What algorithms should be used to implement the functions of each module, routine and subroutine? What programming language

statements should be used to execute the algorithms? The creative effort that goes into these choices is no less than that required for a work of literature. A large computer program, such as Plains' Telcot, is the end result of a substantial investment of time, resources, and human ingenuity.

2. *Copyright Law Protects Against Copying of the Structure and Organization of Other "Literary" Works.* — A valid copyright gives the owner the exclusive right to reproduce the copyrighted work. 17 U.S.C. § 106(1), (2). Because copying is often surreptitious, direct proof of copying may be impossible. Accordingly, copying is inferred from proof of access and substantial similarity of the infringing work to the copyrighted work. *See Miller v. Universal City Studies, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981); 3 M. Nimmer, NIMMER ON COPYRIGHT § 12.11[D] (1986) [hereinafter cited as NIMMER]. Two additional questions follow from the substantial similarity test.

The first additional question is how much similarity is *substantial* similarity? It is clear that verbatim copying is not required. Under well-established copyright principles, a "paraphrase" of a copyrighted work is still infringing. *See, e.g., L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("in copyright law paraphrasing is equivalent to outright copying"); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931) (L. Hand, J.) (copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations"). *See generally* 3 NIMMER § 13.03[A] (discussing "comprehensive nonliteral similarity").

The second question raised by the substantial similarity test is similarity of *what*? Copyright protects only an author's expression of an idea, and not the idea itself. 17 U.S.C.

§ 102(b). 2 NIMMER § 8.01[D] ("Even if the defendant has copied from the plaintiff's copyrighted work, if the only material thus copied are those elements of plaintiff's work which are not protectible, then the resulting copy will not constitute an infringement."). Thus, precise copying of an unprotected idea does not infringe. A copyrighted work may contain various levels of protectible "expression" in the spectrum between the literal expression of the work and the "idea" embodied in the expression. Locating the dividing line along this spectrum between unprotectible abstract ideas and protectible concrete expression is a "most difficult question." 3 NIMMER § 13.03[A], at 13-22. Judge Learned Hand stated a helpful analytical framework describing "levels of abstraction":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

It is clear that in the literary context, copyright protection extends to levels of structure more abstract than the literal level of expression. *See, e.g., Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983) (similarities between *Battlestar Galactica* television program and *Star Wars* movie may be basis for infringement); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (similarities between McDonaldland char-

acters and H.R. Pufnstuf characters may be basis for infringement); *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, 517 F. Supp. 1202, 1207 (N.D. Tex. 1981) (six points of similarity between television commercials established substantial similarity, even absent any literal copying of plaintiff's work).[12] Although the majority of this Court did not reach the substantial similarity issue in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218 (1985), the dissent noted that copyright protects "form" and "structure." *E.g., id.* at 2242, 2243, 2244 (Brennan, J., dissenting).[13]

3. *The Policy and Legislative History of Copyright Show that the Decision Below Was In Error.* — The basis of the decision below was the Fifth Circuit's endorsement of the premise from *Synercom* that there is a difference between the copyrightability of sequence and form in the computer context and in any other context. 807 F.2d at 1262. If that premise is not correct, then the normal principles of copyright law, discussed above, would control and dictate a different legal holding. The Fifth Circuit failed to establish any justification for its conclu-

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[12] In some instances, the idea and the expression are so closely related that there can be no expression of the idea independent of the idea itself. In those circumstances, the idea and the expression are said to have merged, and there is no protectible interest under copyright. *See, e.g., Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 74142 (9th Cir. 1971) (idea of jewel-encrusted bee pin indistinguishable from expression of idea).

[13] Even in the literary context, there are varying formulations of the substantial similarity test, though all protect elements of structure. *See, e.g., Arenstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (copying/improper appropriation test); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) (extrinsic/intrinsic test). *See generally* 3 NIMMER § 13.03[A]. This Court has never spoken on that issue, which would also benefit from uniformity.

sion that computer software is somehow different. Indeed, that is not the case.

First, it is plain that computer programs are properly copyrightable. The legislative history of the 1976 Copyright Act shows that Congress intended that they be covered by the "literary work" category of 17 U.S.C. § 102(a)(1):

> The term "literary works" does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. *It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.*

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 54, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5667 (emphasis added).[14]

Subsequently, the National Commission on New Technological Uses of Copyrighted Works considered what amendments, if any, computer technology required in the 1976 Copyright Act. Congress' subsequent enactment of the Computer Software Copyright Act of 1980, adopting *in toto* the recommendations of the Commission, has given the Commission's Report substantial persuasive authority. *See, e.g., Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1252 (3d Cir. 1983), *cert. dism'd by agmt.*, 464 U.S. 1033 (1984) ("[W]e can consider the CONTU Report as accepted by Congress since Congress wrote into law the majority's recommendations almost verbatim."). The Commission stated that "Flow charts,

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[14] At this time, the antecedent issue of copyrightability *vel non* of computer software is well-established. *See, e.g., Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521 (9th Cir. 1984); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dism'd by agmt.*, 464 U.S. 1033 (1984).

source codes, and object codes are works of authorship in which copyright subsists .... They may not be copied unless such copying is authorized by the proprietor of the copyright therein or by law." National Commission on New Technological Uses of Copyrighted Works, FINAL REPORT 21 (1978) [hereinafter cited as CONTU FINAL REPORT]. In footnote, the Commission defined "flow chart" as "a graphic representation for the definition, analysis, or solution of a problem in which symbols are used to represent operations, data flow, or equipment." *Id.* at 21 n.109. Thus, the CONTU Final Report supports a conclusion that not only are computer programs per se copyrightable, problem definitions, analysis, operations and data flow are also copyrightable elements in a proper case.

The Commission also discussed the point at which copyrightable expression can be found in a computer program:

> To attempt to deny copyrightability to a writing because it is capable of use in conjunction with a computer would contravene this sound policy [against judicial evaluation of aesthetic merits of works of authorship]. Where could a meaningful line be drawn? Between flow chart and source code? Between source code and object code? At the moment of input into a computer or microprocessor? *The Commission believes that none of these is appropriate. The line which must be drawn is between the expression and the ideas, between the writing and the process which is described.*

CONTU FINAL REPORT at 25 (emphasis added). The Fifth Circuit's ruling below committed precisely the error the Commission believed was inappropriate — it drew the line between protectible expression and unprotectible idea, in effect, between flow chart ("functional design") and source code ("line-by-line program design"). The CONTU Final Report, in contrast, endorsed drawing the line in precisely the same place

that it is always drawn in copyright, between idea and expression. As shown above, the traditional drawing of the line between idea and expression provides protection for structure.

The fundamental argument for extending copyright protection to nonliteral elements of computer programs, such as program structure, is that selection and creation of those elements reflect creative choice just as much as the creation of plot and character development in a novel require creative choice:

> Throughout the preparation of a complicated computer program such as SAS, the author is faced with a virtually endless series of decisions as to how to carry out the assigned task. Beginning with a broad and general statement of the overall purpose of the program, the author must decide how to break the assigned task down into successively smaller and more detailed tasks. At the lowest levels the detailed tasks are then programmed in source code. *At every level, the process is characterized by choice, often made arbitrarily, and only occasionally dictated by necessity.*

SAS Institute, Inc. v. S & H Computer Systems, Inc., *605 F.* Supp. 816, 825 (M.D. Tenn. 1985) (emphasis supplied). Every court to consider the question other than the Fifth Circuit has held that this exercise of creative choice in computer programming is protected by copyright, as with any other literary work. *See supra* Part I.A. This Court should grant certiorari to correct the error of the Fifth Circuit in holding that copyright of computer software is somehow different from copyright of any other literary work and provide the uniformity and predictability that this important industry needs.

II. THE DECISION BELOW ERRED IN REQUIRING APPLICANTS FOR PRELIMINARY INJUNCTION FOR COPYRIGHT INFRINGEMENT TO MAKE AN INDEPENDENT SHOWING OF IRREPARABLE HARM

A. The Standard Imposed in the Decision Below for Preliminary Injunction Against Copyright Infringement Will Harm Copyright Holders and Cause Confusion

The Fifth Circuit affirmed the denial of preliminary injunction below on the alternate ground that there was no independent showing of irreparable harm. 807 F.2d at 1261; Appendix at 9-10a. In requiring an independent showing of irreparable harm in a copyright infringement case, the Court of Appeals set the Fifth Circuit apart from every other circuit to consider the issue. *See, e.g., Educational Testing Services v. Katzman,* 793 F.2d 533, 543-44 (3d Cir. 1986); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 526 (9th Cir. 1984); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir.) *cert. denied*, 459 U.S. 880 (1982); 3 NIMMER § 14.06[A], at 14-51 to 14-52 & n.16 (collecting cases).

The holding of the Court of Appeals is significant given the increase in utilization of copyright. As discussed above, copyright is becoming increasingly important for computer-related works. Additionally, the general volume of copyright litigation has been dramatically increasing. *See* OTA REPORT at 268 n.35 (number of copyright cases filed in federal courts increased from 899 in 1976 to 2,226 in 1983). One of the primary reasons utilization of copyright is increasing is the availability of prompt interlocutory remedies without all of the detailed showings normally required for preliminary injunction. *See, e.g.*, Bender, *Protection of Computer Programs: The Copyright/Trade Secret Interface*, 47 U. PITT. L. REV. 907, 917

(1986) (preliminary injunctions are "a most important aspect in the event of litigation" and an advantage of copyright over trade secret). Nimmer describes preliminary injunctions as "more readily granted" in certain types of copyright infringement actions because "delay involved in waiting for a final decree may amount to a denial of any effective relief." 3 NIMMER § 14.06[A], at 14-53 to 14-54.

By setting itself apart from four other circuits on this issue, the Fifth Circuit chose to impair one of the principal attractions of a remedy that is increasingly being utilized by copyright owners. Such a bold departure from established precedent in such a significant area merits review by this Court.

B. Requiring An Independent Showing of Irreparable Harm Contravenes the Policy of Section 502 and Its Legislative History

The Fifth Circuit not only chose to strike out on its own, it is blazing a trail into the wasteland. The Fifth Circuit's rule abuses the sound policy reasons motivating a presumption of irreparable harm. Furthermore, the legislative history of the 1976 Copyright Act supports such a presumption.

The presumption is justified because of the policy determination inherent in Congress' decision to grant exclusive rights to copyright owners. A grant of copyright represents a public bargain in which exclusive rights are granted to encourage creativity. If infringers were permitted to make use of copyrighted materials pending trial, the incentive to create new works would be undermined. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254-55 (3d Cir. 1983), *cert. dism'd*, 464 U.S. 1033 (1984). Thus, by requiring an independent showing of irreparable harm, the Fifth Circuit is creating

a disincentive to create copyrightable works, contrary to congressional policy expressed through the Copyright Act.

This disincentive is exacerbated by the broad language that the Fifth Circuit used in finding no irreparable injury below. The Court of Appeals reasoned that an injunction is not justified if the copyright owner is engaged in a for-profit enterprise,[15] for in such cases money damages can compensate the plaintiff. 807 F.2d at 1261. That argument would reach virtually any copyright in litigation, however; few would bother to infringe a copyright but for the prospect of gain. Thus, the Fifth Circuit's rule would virtually eliminate preliminary injunctions as a viable form of relief for copyright infringement.

Such a result would violate the clear intent of Congress in section 502 of the Copyright Act. That section provides that "Any court having jurisdiction of a civil action arising under this title may . . . grant temporary . . . injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). This section on its face says nothing regarding irreparable harm. Furthermore, if Congress did not for intend anything other than the normal standards for preliminary injunction to apply, it need not have included such a provision at all; the normal application of Rule 65 of the Federal Rules of Civil Procedure would have accomplished that result.

The legislative history of section 502 shows that Congress did not intend such a result. "Section 502(a) *reasserts* the discretionary power of courts to grant injunctions and restraining orders, whether 'preliminary,' 'temporary,' 'interlocutory,' 'permanent,' or 'final,' to prevent or stop infringements of copyrights." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 160, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5776

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[15] Plains, of course, is a not-for-profit corporation.

(emphasis added). Long before 1976, however, it had been the rule that no detailed showing of irreparable injury was required for preliminary injunction for copyright infringement. *See, e.g., Rushton v. Vitale*, 218 F.2d 434, 436 (2d Cir. 1955) (citing numerous cases); *L.C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196, 200 (2d Cir. 1936). By stating that section 502(a) "reasserts" the power of courts to grant preliminary injunctions to prevent copyright infringement, the Congress was indicating an endorsement of this existing practice.

Congress has made the policy judgment that a copyright owner has the *exclusive* right to make use of the copyrighted material, and has expressly provided for a preliminary injunction as a remedy for violation of that right. By imposing an additional requirement on a copyright owner of showing that money damages will not adequately compensate for any infringement of that right, the Court of Appeals has violated this congressional policy and set itself against the vast weight of precedent from the other circuits to consider the question. This Court should grant certiorari to correct that error and restore the balance Congress struck in enacting section 502.

III. THE PROCEDURAL POSTURE OF THIS CASE SHOULD NOT PREVENT A GRANT OF CERTIORARI

Plains is mindful of the fact that this Court is often reluctant to grant certiorari in cases before a final judgment is entered. Plains respectfully suggests that this case merits review in its current procedural posture. First, one of the questions presented raises the pertinent standards for granting preliminary injunction. That question will never be any more clearly presented than it is in the present case. Indeed, Plains suspects that no litigant that has proceeded to final judgment would bother altruistically to assume the burden of raising the issue before this Court simply for the benefit of other future litigants.

Second, the further factual development of a trial on the merits would not assist the Court's consideration of the other question presented, the extent of protection afforded computer software by copyright. As the Court of Appeals noted, that is essentially a legal question. 807 F.2d at 1262 ("The legal finding by the district court ultimately rests on a judgment about the extent of the protection offered by appellant's copyright."). The Court is not faced with an empty factual record, in any event. The preliminary injunction was tried over two days, producing a record of some 569 pages. The factual record before the Court is amply developed to permit consideration of that legal issue.

Finally, little would be gained by letting the issues presented percolate through the lower courts longer before this Court makes an authoritative statement. The opinions in *Whelan* and in the Court of Appeals below stake out the both extremes of the spectrum that this Court should consider. *Whelan* holds that anything more concrete than the ultimate purpose of a computer program is protectible expression; *Plains* holds that anything more abstract than verbatim code is unprotectible idea. The litigants before the Court in this case, the other courts around the country that are considering similar issues, and the participants in the computer software industry who must continue to do business, though faced with the disarray in the circuits, all now need for this Court to speak authoritatively and resolve the dispute.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted. Plains reiterates that Question 3 presented is not offered as an independent reason for granting certiorari. However, in the event certiorari is granted, the Court of Appeals' disposition of Question 3 is an independent ground for reversal.

Respectfully submitted,

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APPENDIX

PLAINS COTTON COOPERATIVE ASSOCIATION OF LUBBOCK, TEXAS,
Plaintiff-Appellant,

v.

GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, RICHARD R. FISHER, PETER H. CUSHMAN, AND CLARENCE MICHAEL SMITH,
Defendants-Appellees.

No. 86-1126.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Jan. 21, 1987.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellant Plains Cotton Cooperative Association of Lubbock, Texas, appeals the denial of its application for a preliminary injunction against appellees Goodpasture Computer Service, Inc., Peter H. Cushman, Richard R. Fisher, William James Godlove, and Clarence Michael Smith, to prevent them from marketing, distributing, or otherwise using software allegedly stolen or copied from appellant. Because we agree with the district court that appellant has not satisfied its burden of demonstrating irreparable harm or substantial likelihood of success on the merits, we affirm the denial of the application for a preliminary injunction.

I.

Plains Cotton Cooperative Association of Lubbock, Texas ("Plains") is a non-profit agricultural cooperative comprised of approximately twenty thousand cotton farmers residing in Texas and Oklahoma. Its purpose is to assist its members in the growing and marketing of cotton. Toward that end, Plains developed a computer software system, Telcot, designed to provide its members with information regarding cotton prices and availability, with accounting services, and with the capability to consummate actual sales electronically.

The Telcot "system" comprises functional specifications outlining what the software can accomplish, design specifications determining how the software accomplishes those functions, programs implementing the design specifications, and documentation detailing the programming and specifications so that future programmers can understand and modify the software. The programs, written in human-readable computer language, are called "source code;" translated into a computer-readable language, they are called "object code." The Telcot system is used by cotton farmers, ginners, and buyers through terminals connected to Plains' large central computer by telephone lines. These terminals allow the system's users to retrieve the desired cotton market information from Plains, but they provide no access to the documentation, programming, design or functional specifications of the Telcot system.

Telcot was first marketed in 1975, and improvements and refinements in the software have been made continuously since that date, The system was developed at Plains by a team of programmers that included appellees Cushman, Fisher, Godlove, and Smith ("employee/appellees"). None of these employees was required to sign confidentiality agreements as a condition of his employment with Plains.

In 1979, Plains' general manager Dan Davis left the company in order to start a new venture called Commodity Exchange Service Company ("CXS"). Davis had been heavily involved with the creation of Telcot, and he wanted to expand its capabilities by adapting Telcot for use on personal computers. CXS and Plains entered into an agreement, on July 5, 1979, for the development, refinement, and marketing of a personal-computer version of Telcot. Under the agreement, any modifications, developments or enhancements of Telcot would be owned jointly by Plains and CXS.

On April 13, 1984, CXS hired Cushman, Fisher, Godlove and Smith away from Plains, and put all four of them to work on the Telcot personal-computer project. When Godlove left Plains, he copied and took possession of a complete tape record of the Telcot source code detailing Telcot's programming. Five days later, Plains gave CXS written notice that it intended to terminate their contract. Subsequently, the parties agreed that their contract would terminate on April 18, 1985, and that Plains would have an irrevocable option through April 18, 1986 to purchase CXS's interest in various programs. Plains never exercised that option.

After working at CXS for approximately one year, the four employees/appellees succeeded in designing a personal-computer version of Telcot, and they produced a document setting out design specifications for the new software. The preliminary nature of the design and the comprehensiveness of the design document are disputed by the parties in this appeal. No programming was actually written for the new software.

In March, 1985, CXS filed for bankruptcy, and the four employee/appellees began to search for other employment opportunities. At that same time, appellee Goodpasture Computer Service, Inc. ("Goodpasture"), a computer service company located in Brownfield, Texas, began discussions with CXS

and its employees concerning various possible joint ventures or working relationships. Goodpasture knew that former Plains employees were working at CXS to create a personal-computer version of Telcot. No agreement was made between Goodpasture and CXS, but Goodpasture did succeed in hiring away from CXS appellees Cushman, Fisher, Godlove, and Smith.

The four employee/appellees signed employment agreements with Goodpasture in which they agreed not to breach any confidences of their former employers, Plains and CXS, while working for Goodpasture. In violation of this employment agreement, however, Fisher brought to his new job a computer diskette containing Telcot programming designs. Twenty days after arriving at Goodpasture, the four former Plains employees had completed a design of a personal-computer version of a cotton exchange program, designated "GEMS" by Goodpasture. By November, 1985 Goodpasture began to market GEMS in a rough, incomplete form. At the time of the preliminary injunction hearing, the software was still not fully operational.

GEMS is very similar to Telcot on the functional specification, programming, and documentation levels. In fact, several pages of the GEMS design manual appear to be direct copies of pages from the design manual appellees created at CXS. The main difference between the two systems is that Telcot is designed to work on a mainframe computer, whereas GEMS is designed for a personal computer. Appellees allege that, with one exception, they did not copy programs used for Telcot, but instead "drew on their knowledge of the cotton industry and expertise in computer programming and design gained over a number of years." The exception is appellee Fisher's admission that he did copy one Telcot subroutine in programming GEMS. When Goodpasture discovered the copying on February 7, 1986, the subroutine was replaced, and Fisher was discharged.

On January 15, 1986, Plains filed suit against Goodpasture and its employees Cushman, Fisher, Godlove, and Smith, seeking damages and injunctive relief for misappropriation of trade secrets, unfair competition, conversion, breach of confidential relationship, and trade dress infringement. After registering its copyright in the Telcot computer programs and associated manuals, Plans amended its complaint to include claims for copyright infringement.

Plains made a motion for a preliminary injunction based on its copyright and trade secret claims, and a hearing was held on February 7 and 10, 1986. Both sides presented expert testimony on the issue of whether GEMS was copied from Telcot. On February 17, the district court denied the motion, and Plains subsequently instituted this appeal.

II.

In order to secure a preliminary injuction, the movant has the burden of proving four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest. *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 471 (5th Cir.1985). These four elements are mixed questions of fact and law. *Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir.1984). In reviewing the findings of fact made by the district court, we will uphold those findings unless they are clearly erroneous. *Id.* In contrast, the court's conclusions of law "are subject to broad review and will be reversed if incorrect." *Commonwealth Life Insurance Co. v. Neal,* 669 F.2d 300, 304 (5th Cir.1982.).

After reviewing findings of fact and conclusions of law, however, we note that ultimately a "district court's decision to grant or deny a preliminary injunction lies within its discretion." *Enterprise International,* 762 F.2d at 472; *Apple Barrel Productions,* 730 F.2d at 386. Thus, we are bound to affirm the judgment of the district court absent an abuse of discretion.

In denying the motion for a preliminary injunction, the district court concluded that appellant had failed to satisfy two of the four prerequisites for injunctive relief: a showing of irreparable harm and a showing of a substantial likelihood of success on the merits. Appellant contends that the district court abused its discretion (1) by using the wrong legal standard in analyzing the copywright infringement claim, and (2) by not addressing the misappropriation of trade secrets claim.

III.

Appellant argues that the district court applied the wrong legal standard in determining that appellant had not demonstrated a sufficient likelihood of success on the merits of its copyright infringement claim. Copyright infringement is shown by proof that the injured party owned copyrighted material and that the infringer copied that material. *Miller v. Universal City Studios,* 650 F.2d 1365, 1375 (5th Cir.1981). Copyright ownership, in turn, is shown by proof of originality, copyrightability, and compliance with applicable statutory formalities. *Apple Barrel Productions,* 730 F.2d at 387. Since direct evidence of copying is often difficult to find, copying can be shown by proof of both access to the copyrighted material and substantial similarity between the two works. *Miller,* 650 F.2d at 1375; M. Nimmer, 3 *Nimmer on Copyright* § 12.11[D] (1985).

Appellant asserts that the district court failed to consider evidence of substantial similarity between GEMS and Telcot.

This argument is based on the district court's apparent reliance on the testimony of two expert witnesses, which testimony, according to appellant, conflicts only on the issue of direct copying.[1] But direct copying is not the central issue in the case, appellent argues; it is "organizational copying": the reproduction of the organizational structure of a software system, outlined generally in the software's design specifications. Appellant asserts that because the expert testimony concerning organizational copying does not conflict, and because the court decided the preliminary injunction motion based on the conflict in testimony of the experts, then the court must have made its decision solely on the basis of whether direct copying occurred. The decision, therefore, ignored the allegedly uncontroverted evidence of substantial similarity resulting from organizational copying.

We do not accept the contention that the district court ignored the evidence of organizational copying and focused exclusively on evidence of direct copying. While the opinion by the district court is admittedly lean, it is open to interpretations other than the one profferred by appellant. The district court specifically based its finding "upon the hearing and the part's [sic] post-hearing briefs," not just on the testimony of the experts. A complete review of the record reveals testimony by several witnesses for appellees that the similarity between

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[1] The district court's opinion contains the following analysis:

> "It was the opinion of the plaintiff's expert witness that the similarities in the two systems . . . were sufficient as a basis for his opinion that defendants had copied plaintiff's system and violated its interest under its copyright.
>
> On the contrary, it was the opinion of the defendant's expert that there were many differences in the two systems . . . and . . . that there was no copying by defendants and no violation of plaintiff's copyright."

the two programs exists on a level not protected by appellant's copyright. Appellees' expert witness, James Bruce Walker, testified that appellees did not copy Telcot. In his opinion, appellent's programs were too large to have been copied and modified in the amount of time appellees took to create GEMS. Walker testified that appellees must have created the software based on their personal skills as computer programmers: "I believe they can take their knowledge of the cotton industry and repeatedly recreate a similar vehicle."

Appellant argues that Mr. Walker was not competent to testify as to whether "copying" occurred because he did not look for organizational copying. The record reveals, however, that Mr. Walker simply was not familiar with the term "organizational" to describe copying on a level broader than verbatim, line-by-line copying. However, Mr. Walker did testify on direct examination that he compared the "overall structure of these programs," and on cross-examination that he "expanded his study" of the programs from the narrow search for verbatim copying. The district court was entitled to rely on both of these statements in interpreting Mr. Walker's expert opinion that GEMS was not "copied" from Telcot.

Further support can be found in appellee William James Godlove's testimony that he did not rely on any material belonging to Plains or CXS during his employment at Goodpasture, that a mainframe program such as Telcot could be altered to run on a personal computer only with enormous changes so that rewriting the programs would be faster than modifying them, and that the residual familiarity with Telcot on which he relied when designing GEMS was "just experience and industry knowledge." Finally, witness Stinson Stokes Smith testified that the subroutines he wrote for Goodpasture were written without reference to any material relating to any of Plains' or CXS's software systems. This testimony is sufficient to support a tentative finding that appellees did not copy

appellant's software. The district court's conclusion that appellent did not demonstrate a sufficient likelihood of success on the merits is not clearly erroneous.

Nor is the finding that appellant failed to demonstrate irreparable harm clearly erroneous. At oral argument, appellant relied on *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3rd Cir.1983), *cert. denied,* 464 U.S. 1033, 104 S.Ct. 690, 79 L.Ed.2d 158 (1984), to assert that irreparable injury is presumed upon a finding of likelihood of success on the merits. That rule, however, is not established in this circuit.[2] On the contrary, we have made it clear in our decisions that preliminary injunctions will be denied based on a failure to prove separately each of the four elements of the four prong test for obtaining the injunction. *See, e.g., Apple Barrel Productions,* 730 F.2d at 389; *Southern Monorail & Co. v. Robbins & Myers, Inc.,* 666 F.2d 185, 186 (5th Cir. 1982).

Appellant did not persuade the district court nor does it persuade us that any harm stemming from the alleged infringement of its copyright is not compensable in damages. In its brief and at oral argument, appellant limited itself to the assertion of a presumption of irreparable injury. The facts supporting appellant's position, however, seem as elusive as the legal principle upon which appellant relies. Appellant's copyright covers a piece of commercial software, and appellees are engaged in a for-profit enterprise of marketing that alleged infringing program. On the surface, this situation does not seem to present many possibilities for the infliction of unquan-

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[2] In *Apple Barrel Productions* we stated:

> This Court has not expressed a view on whether a presumption of irreparable injury (the second prong) as a matter of law is appropriate after a substantial likelihood of success on the merits is shown.

730 F.2d at 390.

tifiable damages. Finally, appellee points out that appellant is entitled to assess its customers a "sold around" charge for cotton not sold through its system. Appellant's vice president testified that, "if a cooperative gin had a Telcot agreement with us and the bale did not sell through the Telcot system, that's fine, but we get the dollar and a half and it is called sell around." These arrangements further ameliorate the risk that appellant will suffer financial harm if its customers use unlawfully competing cotton marketing software. The district court's finding that appellant failed adequately to demonstrate irreparable injury is not clearly erroneous.

Finally, these findings by the district court are not incorrect as a matter of law. Appellant attempts to buttress his argument that copying occurred in fact by the assertion that copying occurred as a matter of law even if appellees relied solely on their memory to construct their new cotton marketing program. Appellant cites cases from Third, Seventh, and Ninth Circuits to establish the proposition that copying done from memory is still copying, and is no less objectionable than any other form of copying.[3] These cases do not, however, rebut the

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[3] *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 64 (3rd Cir.), *cert. denied*, 439 U.S. 880, 99 S.Ct. 217, 58 L.Ed.2d 193 (1978); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir.1971); *Wihtol v. Wells*, 231 F.2d 550 (7th Cir.1956). Interestingly, *Herbert Rosenthal* espouses a definition of copyright infringement that, if used in the instant case, would constitute an abuse of discretion according to appellant's own argument. The case holds that the protection of a copyright precludes only direct copying: "So long as it is not a plagiarized copy of another's effort, there is no requirement that the work differ substantially from prior works or that it contribute anything of value." 446 F.2d at 740. Appellant has already made clear, however, its disagreement with circumscribing the parameters of copyright protection in such a limiting fashion.

conclusion of the district court that copying of protected expression had not been sufficiently demonstrated.

The legal finding by the district court ultimately rests on a judgment about the extent of the protection offered by appellant's copyright. On that issue, we look to our colleague Judge Higginbotham's opinion in *Synercom Technology, Inc. v. University Computing Co.*, 462 F.Supp. 1003 (N.D.Tex.1978). In that case, Judge Higginbotham held that "input formats" of a computer program — the organization and configuration of the information fed to the computer — were ideas, not expressions, and thus were not protected by copyright. 462 F.Supp. at 1014.

To the extent that input formats represent a level of computer software design more specific than functional design and more general than line-by-line program design, the issue of their copyrightability is relevant to the issue of whether GEMS infringes on protected Telcot designs. Appellant urges that we adopt the reasoning of *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3rd Cir.1986), which is admittedly "at odds with Judge Higginbotham's scholarly opinion." *Id.* at 1239. *Whelan* rejects the premise developed in *Synercom* that "there [is] a difference between the copyrightability of sequence and form in the computer context and in any other context," *id.* at 1240, holding that the structure, sequence, and organization of computer programs are copyrightable.

We decline to embrace *Whelan* for two reasons. First, the issue is presented to us on review of a denial of a motion for preliminary injunction. Thus, the record is only partially developed, and our review is one step removed from the actual merits of the case. Second, appellees presented evidence that many of the similarities between the GEMS and Telcot pro-

grams are dictated by the externalities of the cotton market.[4] To that extent, the facts of this case fit squarely within *Synercom's* powerful analogy to the hypothetical development of gear stick patterns. 462 F.Supp. at 1013. The record supports the inference that market factors play a significant role in determining the sequence and organization of cotton marketing software, and we decline to hold that those patterns cannot constitute "ideas" in a computer context.

Appellant has thus failed to demonstrate that the factual findings of the district court regarding the copyright infringement claim are clearly erroneous or that the findings of law are incorrect. We affirm the denial of the motion for a preliminary injunction on the copyright claim.

IV.

Appellant's request for a preliminary injunction was also based on its claim that appellees improperly made use of its trade secrets. Misappropriation of trade secrets is shown by proof: (1) that a trade secret existed, (2) that the trade secret was acquired through a confidential relationship, and (3) that the defendant used the trade secret without authorization from the plaintiff. *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication,* 584 F. 2d 946, 951 (10th Cir. 1978), citing *Official Airlines Schedule Information Service v. Eastern Air Lines,* 333

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[4] For example, appellees' witnesses testified that their cotton marketing program was designed to present the same information as is contained on a cotton recap sheet, within the confines imposed by use of a computer. By contrast, appellant's expert witness admitted on cross-examination that he had no knowledge of the cotton industry and had never seen a cotton recap sheet, and thus could not comment on whether the similarity between GEMS and Telcot arises from the the attempt of both programs to convey the same standardized information to the user.

F.2d 672, 673-74 (5th Cir. 1964). The district court found that appellant could not demonstrate a sufficient likelihood of success on the merits because it failed to satisfy the third prong of this three-point test.[5]

Admittedly, the district court's findings do not differentiate between the copyright and trade secrets claims. The record shows, however, that the court did consider the trade secret claim alongside the copyright claim throughout. It is true that a protected interest in trade secrets is more easily created than such an interest in copyrighted material. But the trade secrets allegedly involved here are particular implementations of software functions. The critical point is that the misuse of these implementations can occur only through copying the particular software designs on a sufficiently specific level. These are not alleged marketing or mode of doing business trade secrets. They are matters of design, where the issue of misuse boils down to evidence of copying. If no copying occurred on any level, appellant cannot demonstrate that appellees misused the trade secrets they allegedly possessed.

The district court relied in its findings upon the opinion of appellees' expert witness that no copying of appellant's software occurred. We have discussed above the evidence in the record supporting this finding. Considering the evidence presented, the trade secrets battle was nothing more than a restaging of the copyright battle. If appellees did not in any way "copy" any part of appellant's protected idea or expres-

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[5] In finding that appellant failed to demonstrate irreparable harm the district court was considering the copyright and trade secret claims together. Without repeating our analysis, then, we find that the district court's conclusion that appellant failed to demonstrate irreparable harm based on its trade secrets claim is not clearly erroneous.

sion, then appellant cannot demonstrate trade secret misappropriation any more than its can show copyright infringement.

The district court's finding is also supportable as a conclusion of law. While an employee owes a duty to his employer not to disclose any knowledge of that employer's trade secrets, the "employee, upon terminating his employment relationship with his employer, is entitled to take with him 'the experience, knowledge, memory, and skill, which he . . . gained while there employed.'" *Anaconda Co. v. Metric Tool & Die Co.*, 485 F.Supp. 410, 423 (E.D.Pa.1980) (citation omitted). Also persuasive is the statement in *Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.*, 401 F.Supp. 1102, 1111 (E.D.Mich.1975): "[I]f the subject matter of the trade secret is brought into being because of the initiative of the employee in its creation, innovation or development even though the relationship is one of confidence, no duty arises since the employee may then have an interest in the subject matter at least equal to that of his employer or in any event, such knowledge is a part of the employee's skill and experience."

Whether or not the development of GEMS involved the application of appellees' skill and experience or of appellant's trade secrets is a question of fact. The district court's factual finding, then, distinguishes this case from those relied upon by appellant, where the defendant did make use of trade secrets. *See, e.g., FMC Corp. v. VARCO International, Inc.*, 677 F.2d 500 (5th Cir.1982); *Weed Eater, Inc. v. Dowling*, 562 S.W.2d 898 (Tex.Civ.App.1978, writ ref'd n.r.e.); *Electronic Data Systems Corp. v. Powell*, 524 S.W.2d 393 (Tex.Civ.App.1975, writ ref'd n.r.e.).

Finally, appellant argues that the district court violated Fed.R.Civ.P. 52(a) by failing adequately in terms to address appellant's trade secret misappropriation claim. Rule 52(a)

requires that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of the action." We find that the district court discharged its duty under this rule. As explained above, the record supports the tentative determination that no copying occurred. The court's statement that appellant failed to demonstrate a likelihood of success on the merits is therefore as applicable to the trade secrets claim as it is to the copyright infringement claim, and satisfies the court's obligation under Fed.R.Civ.P. 52(a).

Appellant has failed to demonstrate that the factual findings of the district court regarding the trade secrets misappropriation claim are clearly erroneous or that the findings of law are incorrect. We affirm the denial of the motion for a preliminary injunction on the trade secrets claim.

CONCLUSION

Appellant failed to demonstrate a sufficient likelihood of success on the merits of its claims, and failed to present sufficient proof of irreparable harm to justify a preliminary injunction. The judgment of the district court denying the motion for a preliminary injunction is

AFFIRMED.

U.S. COURT OF APPEALS
FILED
FEB 19 1987
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86 1126

PLAINS COTTON COOPERATIVE ASSOCIATION OF LUBBOCK, TEXAS,
Plaintiff-Appellant,

VERSUS

GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, RICHARD R. FISHER, PETER H. CUSHMAN AND CLARENCE MICHAEL SMITH,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 21, 5 Cir., 1987, _____ F.2d ____)

(February 19, 1987)

Before THORNBERRY, JOHNSON AND WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

Entered For The Court:

/s/ J. S. WILLIAMS
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CIVIL ACTION NO. CA-5-86-19

PLAINS COTTON COOPERATIVE,
ASSOCIATION OF LUBBOCK, TEXAS,

Plaintiff,

v.

GOODPASTURE COMPUTER SERVICE, INC.,
WILLIAM JAMES GODLOVE, RICHARD R.
FISHER, PETER H. CUSHMAN, AND
CLARENCE MICHAEL SMITH,

Defendants.

ORDER

This matter came before the court on plaintiff's application for a preliminary injunction, the undersigned Judge presiding. The defendants oppose such action.

To determine this issue, a hearing was held, with both parties present, on February 7, 1986, and February 10, 1986. Both sides submitted briefs supporting their position on February 14, 1986.

In *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, et. al.*, 762 F.2d 464 (5th Cir. 1985), the Fifth Circuit stated the requirements for granting a preliminary injunction. Specifically, the court noted that the moving party has the burden of proving the following four elements:

"(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if the injunction is not issued;
(3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and
(4) that the injunction will not disserve the public interest."

Id. at 471 (quoting *Apple Barrel Productions v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984). Furthermore, the court stated that a "district court's decision to grant or deny a preliminary injunction lies within its discretion." *Id.* at 472.

It was the opinion of the plaintiff's expert witness that the similarities in the two systems, which he had enumerated, were sufficient as a basis for his opinion that defendants had copied plaintiff's system and violated its interest under its copyright.

On the contrary, it was the opinion of the defendants' expert that there were many differences in the two systems, which he enumerated, and that he based his opinion on these differences to the effect that there was no copying by defendants and no violation of plaintiff's copyright.

Based upon the hearing and the part's [sic] post-hearing briefs, the court is of the opinion that plaintiff's application for a preliminary injunction should be denied. The court finds that plaintiff presented insufficient proof on each of the above-cited elements, especially that of irreparable harm and the failure to establish that the plaintiff had a substantial likelihood of success on the merits.

Accordingly, plaintiff's application for a preliminary injunction is denied.

Permission is given to defendants to file their amended answer and counterclaim provided that same is filed with the Clerk of this court on or before February 24, 1986, and the

plaintiff shall have until March 10, 1986 within which to file a reply with the Clerk of this court.

The parties will proceed with discovery but the trial of the case on its merits will not be established by the court at this time. The court is scheduled for trials and notices have been sent to the attorneys that will make it impossible for this case to be set for trial on its merits prior to September 1, 1986. The court will advise the attorneys further at a later date.

The Clerk will furnish a copy hereof to each attorney and each necessary party.

ENTERED this 17th day of February, 1986.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
Chief Judge
Northern District of Texas

Supreme Court, U.S.
FILED
JUN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PLAINS COTTON COOPERATIVE
ASSOCIATION OF LUBBOCK, TEXAS
Petitioner,

v.

GOODPASTURE COMPUTER
SERVICE, INC., et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, PETER H. CUSHMAN, AND CLARENCE MICHAEL SMITH

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June 19, 1987

QUESTIONS PRESENTED

1. Whether copyright protection of a computer program that is highly functional and significantly influenced by external market practices and factors should extend to the overall structure, sequence, and organization of the program?

2. Whether an applicant for a temporary injunction against an alleged copyright infringer must show irreparable harm when the opposing party introduces evidence demonstrating the absence of irreparable harm?

[Although Petitioner does not view Question 3 as meriting certiorari independently, Petitioner reserved the right to argue Question 3 in the event certiorari is granted on either of the preceding Questions.]

3. Whether the Court of Appeals must require the District Court to separately state its reasons for affirming the denial of a temporary injunction on trade secret and copyright claims, when Petitioner's presentation of its case to the District Court failed to delineate or distinguish between its copyright cause of action and its trade secret claim.[1]

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[1] Fed. R. Civ. P. 52(b) provides: "Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59." Petitioner failed to request additional findings of fact in accordance with Rule 52(b).

LIST OF PARTIES

In addition to the parties listed in the Petition, Goodpasture Computer Service, Inc. is a wholly owned subsidiary of Goodpasture, Inc. Goodpasture Export Corporation, a wholly owned subsidiary of Goodpasture, Inc., is Goodpasture Computer Service, Inc.'s only other affiliate.

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Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed by agreement,* 464 U.S. 1033 (1984) 15

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Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189 (2d Cir. 1985) 15

Kepner-Tregoe, Inc. v. Carabio, 203 U.S.P.Q. 124 (E.D. Mich. 1979) 9

Kontes Glass Co. v. Lab Glass, Inc., 373 F.2d 319 (3d Cir. 1967) 15

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 1485 (9th Cir.), *cert. denied,* 469 U.S. 1037 (1984) 8, 9

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U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronic and Information* (April 1986) 12-13 n.4

No. 86-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PLAINS COTTON COOPERATIVE
ASSOCIATION OF LUBBOCK, TEXAS
Petitioner,

v.

GOODPASTURE COMPUTER
SERVICE, INC., et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, PETER H. CUSHMAN, AND CLARENCE MICHAEL SMITH

Respondents, Goodpasture Computer Service, Inc. ("Goodpasture"), William James Godlove ("Godlove"), Peter H. Cushman ("Cushman"), and Clarence Michael Smith ("Smith") (sometimes collectively referred to as "Respondents"), respectfully pray that the petition of petitioner, Plains Cotton Cooperative Association of Lubbock, Texas ("Plains"), for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 21, 1987, be denied.

STATUTES INVOLVED

17 U.S.C. §102(b). In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

COUNTERSTATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

On January 15, 1986, Plains Cotton Cooperative Association of Lubbock, Texas ("Plains"), filed suit against Goodpasture, Godlove, Richard R. Fisher ("Fisher"), Cushman, and Smith in the United States District Court for the Northern District of Texas, Lubbock Division. In its Original Complaint, Plains sought a preliminary injunction for alleged taking of trade secrets and other relief. Also on January 15, 1986, Plains filed a motion for expedited discovery, which the court granted. The court set Plains' application for a preliminary injunction for a hearing on February 7, 1986. On February 3, 1986, Plains amended its Complaint and added a cause of action for copyright infringement.

On February 7 and 10, 1986, just three weeks after service of process had been effected, the court held an evidentiary hearing on Plains' application for injunctive relief. The court subsequently received post-submission trial briefs and offers of proof from both sides on both the trade secret and copyright claims. The key issue was whether Respondents copied Plains' software. Plains' expert said yes; Respondents' expert said no; and, Respondents' other witnesses emphatically denied copying. Plains' evidence of organizational or structural sim-

ilarity was directly contradicted by testimony of Respondents' expert and other witnesses. Respondents offered testimony and exhibits demonstrating that fundamental differences in the hardware itself made copying useless and dictated major structural differences in the software systems. On February 17, 1986, the district court, apparently deciding Respondents' evidence was more credible, denied Plains' application for a preliminary injunction, explaining that Plains had not shown itself entitled to an injunction under the standard of *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464 (5th Cir. 1985). Although the district court found that Plains presented insufficient proof on *each* of the elements required for a preliminary injunction, the court emphasized that Plains had especially failed to show irreparable harm or a substantial likelihood of success on the merits. Appendix at A-19.[2] On February 24, 1986, Plains filed its Notice of Appeal to the Fifth Circuit Court of Appeals.

Oral argument before the Fifth Circuit was presented to the Honorable Judges Thornberry, Johnson, and Williams on September 4, 1986. On January 21, 1987, the Fifth Circuit affirmed on two bases, one factual and one legal. First, the Fifth Circuit concluded that the district court's conclusion that Plains did not demonstrate a sufficient likelihood of success on the merits was not clearly erroneous. Second, consistent with long standing precedent in the Fifth Circuit, the Court of Appeals held that the district court's finding that Plains failed to demonstrate irreparable harm was not clearly erroneous. Appendix at A-9. On February 19, 1987, the Fifth Circuit Court of Appeals denied Plains' petitions for rehearing and rehearing *en banc.* Appendix at A-16.

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[2] References to "Appendix" throughout this brief shall mean the appendix to Plains' petition herein.

II.

STATEMENT OF FACTS.

Plains is an agricultural cooperative association composed of approximately 20,000 cotton producers. In the 1970s, Godlove, Fisher, Cushman and Smith (collectively, the "Individual Defendants") worked as computer programmers for Plains and contributed to the development of "Telcot," Plains' electronic cotton marketing and accounting system. Telcot is designed so that each gin on the system is linked to a central mainframe computer at Plains' offices by dedicated telephone lines. All of the data used in the system is stored in the central computer, and the individual terminals located out in the field are "dumb" terminals. In addition to providing computerized marketing and accounting to its members through Telcot, Plains actively trades cotton for its own account over the Telcot system.

Plains never required any of the Individual Defendants to sign confidentiality agreements as a condition of their employment. Neither did Plains require any of the persons who received Telcot user manuals or who used the system to keep their knowledge of materials contained in the manuals or information they learned concerning the organizational structure of Telcot confidential.

In 1984, the Individual Defendants left Plains and began working for Commodity Exchange Service Co. ("CXS"), a computer service company whose president was Dan Davis, a former executive officer of Plains. CXS and Plains entered into a contract on July 5, 1979, in which the two entities shared in the operation of Telcot. On April 18, 1984, several days after three of the Individual Defendants started work at CXS, Plains gave written notice that it intended to terminate the contract. Subsequently, Plains and CXS agreed that the contract would terminate as of April 18, 1985. One of the provisions of this subsequent agreement was that Plains had an irrevocable

option, effective until April 18, 1986, to purchase from CXS for the sum of $125,000 "all micro-computer and mainframe communications software programs for the electronic marketing of cotton, on-line gin accounting and related gin programming packages which [CXS] develops" before that date. Plains has never exercised this option. CXS is not a party to this lawsuit. Although Plains contended that Respondents copied from CXS, Plains failed to demonstrate it has standing to assert any claim that might belong to CXS.

The Individual Defendants continued to work at CXS following its bankruptcy in March 1985 in an effort to help salvage the bankrupt corporation. The Individual Defendants worked with Dan Davis and helped prepare several conceptual design documents to be presented to prospective buyers of CXS to convince them to invest in CXS. These documents included preliminary descriptions of a personal computer-based system for use in the cotton industry. They were not, as Plains describes them, "comprehensive design documents" (Petition at 4) by any stretch of the imagination. This proposed system never was formally designed, and none of the computer code that makes up a computer system was ever written for the proposed system.

After filing bankruptcy, CXS approached Goodpasture, a computer service company based in Brownfield, Texas, about the possibility of its purchasing CXS's assets or managing CXS for a fee. Goodpasture considered CXS's management proposal at length, but no agreement resulted.

CXS last paid the Individual Defendants their salaries on or about June 15, 1985. After their paychecks bounced, they attempted to find work elsewhere. Plains would not hire them back, although it did offer Bill Godlove $30,000 to sign a non-competition agreement which he regarded as a "payoff" and refused.

Ultimately, each of the Individual Defendants was hired by Goodpasture and began, with two independent contract

programmers, a project to design and implement a personal computer-based cotton marketing and accounting system. The programmers drew on their knowledge of the cotton industry and expertise in computer programming and design gained over a number of years. They did not copy Telcot or any existing or previously proposed system, but instead independently designed the Goodpasture computer system, Goodpasture Electronic Marketing Systems ("GEMS").[3]

Although Plains' expert, Dr. Udo Pooch, claimed he saw similarities between the two systems which led him to believe that GEMS was copied from Telcot, he exhibited a great deal of ignorance of the cotton business and the transactions which Telcot and GEMS have computerized. He stated that he did not know the function of a cotton recap sheet. He did not know whether certain business requirements of the cotton industry might dictate the way information should logically be displayed on a computer screen. He did admit, however, that similarities in appearance of the Telcot and GEMS screens might be due to the fact that they present the same basic information. He also confessed that he had no idea how either Telcot or GEMS actually operated in the real world.

Respondents' expert witness, Mr. James B. Walker, who demonstrated a life-long knowledge of the cotton business, testified that GEMS was not copied from Telcot. He examined computer code from both systems and looked for signs of copying such as misspellings, illogical surplusage of language,

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[3] The sole exception relates to the matters described in counsel's letter to the district court dated February 10, 1986. Defendant Richard Fisher approached counsel late on Friday, February 7, 1986, and advised for the first time that, contrary to his written employment agreement and repeated instructions by Goodpasture, he had taken a "shortcut" and had utilized a subroutine he found on a hard disk that had been obtained from CXS. He was promptly fired, and Goodpasture hired an independent programmer, "Stoney" Smith, to replace this routine in its entirety with one independently created by him. Mr. Smith testified in the trial court as to the work he did over the weekend, and other witnesses demonstrated that this subroutine was entirely eliminated from the Goodpasture system before the conclusion of the hearing.

and bad programming grammar. He stated that his opinion was that GEMS was not copied from Telcot. He noted that on a design level Telcot is a system with programs that do not flow smoothly, while GEMS has a distinctly coherent, "tight" structure. He also stated that he did not find that Telcot and GEMS were organized in a similar fashion.

Bill Godlove and Buddy Kelsay testified unequivocally that Respondents did not copy Telcot. They described in detail the process of creating GEMS from scratch. They also described the fundamental differences between the two systems which are so significant that Plains could not even copy its own mainframe software for use in a personal computer despite a major effort to do so. Extensive cross-examination by Plains' counsel afforded the trial court a unique opportunity to judge the credibility of the witnesses.

Respondents' Exhibits 60 and 61, which Bill Godlove discussed at length, set forth major conceptual, hardware, organization, data storage, and other differences between the two systems. These significant and substantial differences were not disputed. As Mr. Godlove explained, the result was that GEMS stores its data in substantially fewer files, different programs are necessary to access the data, the language the computers use is different, and fewer programs are required to accomplish the same functions. Indeed, Plains is now trying to create its own personal computer-based system similar to that developed by Goodpasture. Even though it has free access to all of its own programs, Plains' witness, Stu Childre, testified that the task is a major undertaking for Plains. This corroborates Respondents' position — not only was there no copying, but copying would be unavailing due to the fundamental differences in the two systems.

Plains' case rested entirely on Dr. Pooch, who was totally unfamiliar with the cotton industry and how industry practices might affect the organization of a computer system or logic in a computer program dealing with the marketing of cotton and the

accounting system required by cotton farmers and ginners. Dr. Pooch also stated that he has formed an opinion as to whether a particular computer system was copied on each of ten occasion when he was asked to do so, and in each case he rendered an opinion that supported the party who commissioned his work. Dr. Pooch admitted he does not select his clients and, therefore, theoretically his client's position on the issue of copying should be the correct one only half the time; however, he could not explain why his expert opinions always supported his clients. Indeed, this case turned on the district court's judgment as to the credibility of the witnesses.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

UNDER TRADITIONAL COPYRIGHT PRINCIPLES, PETITIONER FAILED TO SHOW A SUFFICIENT DEGREE OF SIMILARITY TO OBTAIN THE BROAD RELIEF SOUGHT.

The copyright law itself has long recognized that there are significant differences between different types of works. Those differences have been accommodated by variations in the scope of copyright protection accorded to the different types of works. *See Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ("Degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it."); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 616-17 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) ("That a work is copyrighted says very little about the scope of its protection").

At one end of the spectrum of protection, highly expressive and fanciful works, such as novels and poems, have received

the highest degree of protection, including protection for their nonliteral elements. *See, e.g., Twentieth Century-Fox Film Corp. v. MCA, Inc.,* 715 F.2d 1327, 1329 (9th Cir. 1983) (motion pictures). At the other end of the protection spectrum, works such as business and legal forms, recipes, and contest rules have received only the narrowest form of protection, often to the point of requiring literal duplication for infringement. *See, e.g., Landsberg,* 736 F.2d at 488 (description of game strategy); *Continental Casualty Co. v. Beardsley,* 253 F.2d 702, 706 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958) (business forms); *Kepner-Tregoe, Inc. v. Carabio,* 203 U.S.P.Q. 124, 131 (E.D. Mich. 1979) (societal interest is in giving only narrow protection to works that teach or explain the useful arts so that many may offer the art in the market place); 3 M. Nimmer, *Nimmer on Copyright,* §13.03[A] at 13-39 (1984) ("[w]ith respect to commercial documents . . . the similarity probably must be more extensive than in the case of more artistic works in order to justify [infringement]"). *See also Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1168 (9th Cir. 1977) ("the scope of copyright protection increases with the extent expression differs from the idea").

In this case, the district court properly concluded, consistent with traditional copyright principles, that the scope of Plains' copyright protection was relatively narrow due to the fact that practices in the cotton industry, which predated the advent of electronic digital computers by several decades, had a significant impact on the design of both parties' systems. The Fifth Circuit noted that "Respondents presented evidence that many of the similarities between the GEMS and Telcot programs are dictated by the externalities of the cotton market. . . . The record supports the inference that market factors play a significant role in determining the sequence and organization of cotton marketing software, and we decline to hold that those patterns cannot constitute 'ideas' in a computer context." Appendix at A-12.

II.

SIMILARITY OF STRUCTURE, ORGANIZATION, AND SEQUENCE WAS CONTESTED ISSUE OF FACT THAT WAS CONSIDERED BELOW.

Even if the Fifth Circuit had adopted the reasoning set forth in *Whelan Assoc., Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied,* _____ U.S. _____, 107 S.Ct. 877, 93 L.Ed.2d 831 (1987), it is clear from the Fifth Circuit's opinion that the outcome in this case would still have been the same. Plains argued before the Fifth Circuit, as it does here, that similarity of organization, structure, and sequence was uncontroverted; in fact, the issue of similarity of organization, structure and sequence was a hotly contested issue on which the conflicting evidence was resolved against Plains.

In stark contrast to the assertions that Plains continues to make that GEMS is "virtually identical" (Petition at 3) or "highly similar" (Petition at 5) to Telcot, or that GEMS is or was intended to be a "Telcot 'clone'" (Petition at 5), Respondents introduced evidence that GEMS was significantly different from Telcot and that any similarities between the two necessarily resulted from the fact that the two systems were designed to perform basically the same calculations and functions. Respondents' expert testified concerning the differences in the overall structure and organization of the two programs. This testimony was corroborated by two other witnesses, Bill Godlove and Buddy Kelsay, who both testified that GEMS was not designed the way the Telcot system was and that GEMS was based on an entirely different design concept from that of Telcot. Respondents' witnesses further testified that (i) GEMS runs on different hardware, (ii) GEMS is written in a different programming language, (iii) GEMS is all on line and has no batch mode, (iv) GEMS requires less than half the programs required by Telcot, (v) GEMS stores data in less than half the files required by Telcot, (vi) GEMS provides functions that

Telcot does not and vice versa, (vii) Telcot's programs will not run unaltered on the type of equipment used in connection with GEMS, and (viii) Respondents had to invent control and system programs for GEMS that necessarily affected its application programs.

With respect to similarity of organization, structure, and sequence, the Fifth Circuit noted:

> A complete review of the record reveals testimony by several witnesses for appellees that the similarity between the two programs exists on a level not protected by appellant's copyright. Appellees' expert witness, James Bruce Walker, testified that appellees did not copy Telcot. In his opinion, appellant's programs were too large to have been copied and modified in the amount of time appellees took to create GEMS. Walker testified that appellees must have created the software based on their personal skills as computer programmers: "I believe they can take their knowledge of the cotton industry and repeatedly recreate a similar vehicle."
>
> Appellant argues that Mr. Walker was not competent to testify as to whether "copying" occurred because he did not look for organizational copying. The record reveals, however, that Mr. Walker simply was not familiar with the term "organizational" to describe copying on a level broader than verbatim, line-by-line copying. However, Mr. Walker did testify on direct examination that he compared the "overall structure of these programs," and on cross-examination that he "expanded his study" of the programs from the narrow search for verbatim copying. The district court was entitled to rely on both of these statements in interpreting Mr. Walker's expert opinion that GEMS was not "copied" from Telcot.

Appendix at A-7—A-8. Thus, the Fifth Circuit deferred to the findings of fact of the district court on the issue of "organizational" copying. This Court should not accept as facts what are, in reality, only Plains' contentions, which neither the district court nor the Fifth Circuit accepted.

III.

IN REALITY WHAT PETITIONER SEEKS IS A *DE NOVO* REVIEW OF THE RECORD.

The only real questions Plains raises in its Petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Plains asks this Court to make a third review of a complex factual record to see if it can find what two previous courts have been utterly unable to find—either proof of actual copying or sufficient similarity to justify the presumption of copying. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). While Plains discusses interesting legal issues, they are simply not raised by the facts of this case, as found by the district court.[4]

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[4] Indeed, Plains advocates a legal proposition that would extend copyright protection beyond the intent and policy of the Copyright Act and do great harm to this country's economy as a result. Of course, copyright protects against copying of unique source code, which is an arbitrary "expression" of the program. However, the ease of obtaining a copyright and the extended term of protection it provides renders protection beyond the source code very dangerous.

> If . . . courts continue to interpret the expression in computer programs as broadly as they have in recent cases, developers of computer programs may also be adversely affected. If copyright in computer programs is held to extend to the "useful knowledge"—the method of achieving certain results—embodied in the program structure or algorithms, copyright may block software innovators by precluding the creation of programs that differ in detail, but implement and perhaps improve on copyrighted programs. The patent system was designed to have this effect, but it is inappropriate for the copyright system, which was neither doctrinally nor administratively designed to protect functional information. Overly broad copyright protection would give the owner patent-like protection over processes for a much longer duration than patent law provides, and do so with no examination for the program's novelty or nonobviousness, as is required by patent law. Moreover, patent law requires that an invention be an advance over the "prior art," requiring an inventor to examine previously patented claims before

IV.

THE COURT SHOULD NOT CONSIDER FACT SENSITIVE ISSUES ON AN INCOMPLETE RECORD AT A PRELIMINARY STAGE IN THIS LITIGATION.

It is a well established principle of copyright law that copyright protection does not extend to "ideas", but only protects the "expression" of an idea. Section 102(b) of the Copyright Act provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. §102(b). As Judge Learned Hand explained, the dividing line between idea and expression is an elusive, fact specific concept

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gaining patent protection. For this reason, the Patent and Trademark Office keeps records of all patents that have been issued. But the Copyright Office does not keep records of "prior art," which leaves no way of predetermining whether a program that performs similar functions or obtains similar results will infringe a previously copyrighted program.

U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* at 83 (April 1986).

Many programs incorporate ideas taken from (and indeed dictated by) industry practice, such as those involved in this case. To protect the "look and feel" of a program, as Plains demands, would enable the first to computerize and copyright an existing process or practice to block innovation, charge royalties and otherwise impede developments and innovation in the fast paced world of computer programming.

In *Whelan,* the court set up arguments it could knock down to reach its desired result. For example, by defining the "idea" as a computer system for the efficient operation of a dental laboratory, everything else thus became protectable "expression." However, the court in *Whelan* raised, but failed to answer, the principal policy argument against its liberal approach. While it quoted Sir Isaac Newton's remark "if I had seen farther than other men, it was because I had stood on the shoulders of giants," *Whelan,* 797 F.2d at 1238, n.33, it failed to recognize the result of its approach would be to outlaw the very means used by Sir Isaac Newton to achieve his wonderful contributions to society.

that will "inevitably be *ad hoc.*" *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).[5]

Plains' case is really nothing more than an attempt to protect the idea of a computerized cotton marketing system. Plains presented evidence of "algorhithmic similarities" (expert jargon for similar formulas); however, Plains' expert witness stated that he was not knowledgeable of the cotton industry or how the underlying requirements of the industry may have affected the structure of the system and its component programs. Standard industry computations could, of course, require the use of similar formulas in any marketing system. Certainly there are bound to be "algorhithmic similarities" between the two systems because they are both designed to perform basically the same calculations and functions.[6] The concept of a computerized cotton marketing system and various programs required to computerize the underlying business functions of classifying, offering, selling and keeping track of sales of cotton, however, is not protectable. These standard functions were highly developed long before the advent of computers. The similarities that were shown to exist in the case result from cotton industry requirements (*e.g.*, unprotectable "ideas") and not copying. Although Plains will have, at the final evidentiary hearing, another chance to persuade the district court on the expression/idea dichotomy, it is premature for this Court to enter into such a fact sensitive fray.

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[5] Unfortunately, in *Whelan* the Third Circuit did not heed Judge Hand's admonition, but instead set about to establish a "bright-line" rule of its own, which provides absolutely no guidance and is totally unworkable. The court held: "[T]he purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea." *Whelan*, 797 F.2d at 1236. This does not advance the matter any because it merely begs the question of how broadly (or narrowly) "purpose or function" should be defined in a particular case.

[6] For example, one function both systems perform is to compute the price of a given bale of cotton. The price of a bale of cotton is computed by multiplying the weight of the bale times the price per pound and then subtracting the storage charges. Because of the simplicity of many algorithms, "algorithmic similarities" are certain to occur between two computer programs that perform the same basic calculations.

V.

ANY PRESUMPTION OF IRREPARABLE HARM IS REBUTTABLE AND WAS REBUTTED IN THIS CASE BY RESPONDENTS.

In the petition, Plains characterizes the Fifth Circuit's holding as a "bold departure from established precedent." Petition at 25. However, the Court of Appeals' decision was entirely consistent with "established precedent" within the Fifth Circuit. *See, e.g., Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 471 (5th Cir. 1985); *Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984).

Prior to *Apple Computer, Inc. v. Franklin Computer Corp.,* 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed by agreement,* 464 U.S. 1033 (1984) a plaintiff's burden of showing irreparable injury varied inversely with the strength of its showing of a likelihood of success on the merits. *Kontes Glass Co. v. Lab Glass, Inc.,* 373 F.2d 319, 320-21 (3d Cir. 1967). Although the Third and other circuits have adopted a more liberal approach than the Fifth Circuit, they have not done away with the requirement of irreparable harm as a prerequisite to the granting of a preliminary injunction. Instead they reason "a prima facie showing of copyright infringement creates a *rebuttable* presumption of irreparable harm." *Educational Testing Services v. Katzman,* 793 F.2d 533, 543-44 (3d Cir. 1986) (emphasis added). The other cases cited on page 24 of Plains' petition also hold that only after a plaintiff has established a likelihood of success on the merits does a *presumption* of irreparable harm arise, and none of the cases hold that the presumption is irrebuttable. *See Hasbro Bradley, Inc. v. Sparkle Toys, Inc.,* 780 F.2d 189, 192 (2d Cir. 1985); *Apple Computer, Inc. v. Formula International, Inc.,* 725 F.2d 521, 525 (9th Cir. 1984); *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 620 (7th Cir.), *cert. denied,* 459 U.S. 880 (1982).

Even if the Fifth Circuit were to follow the lead of the Second, Third, and Seventh Circuits in this regard, it would not alter the results obtained below for two reasons. First, Plains failed to establish a liklihood of success on the merits so as to give rise to the presumption of irreparable harm. Second, Respondents introduced evidence sufficient to rebut a presumption of irreparable harm. Respondents introduced evidence that Goodpasture intends to target the marketing of its product to independent gins which are not members of Plains or any other co-op, while Plains markets exclusively to its members. Further, as the Fifth Circuit noted, even if a Plains co-op member sold cotton through the GEMS system, Plains would be contractually entitled to assess the co-op member a "sold around" charge, which would "ameliorate the risk that appellant will suffer financial harm if its customers use unlawfully competing cotton marketing software." Appendix at A-10. Further still, Respondents introduced evidence that Plains' damages, if any, are capable of calculation and that Goodpasture is solvent and capable of paying damages. On the other hand, Plains failed to introduce any evidence of irreparable harm, but instead insisted that irreparable harm is presumed and argued as if the presumption were irrebuttable.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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